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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 405

BERNARD J. SEMEL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BERNARD J. SEMEL,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Bernard J. Semel, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on the 31st day of May, 1965. (R. Vol. 1, p. 18)

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit which is not yet reported, is printed in Appendix A, page 8-10.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 31, 1965 (R. Vol. 1, p. 18). By order of the Chief Justice on June 16, 1965, the time for filing a petition for certiorari was extended to July 30, 1965. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a criminal information brought in an improper district vested the District Court of that improper district with authority to enter a judgment of conviction on a plea of guilty.

STATUTES INVOLVED

1. Title 18 U.S.C.A. § 836 provides as follows:

> § 836. Transportation of fireworks into State prohibiting sale or use.—
>
> Whoever, otherwise than in the course of continuous interstate transportation through any state, transports fireworks into any state, or delivers them for transportation into any State, or attempts so to do, knowing that such fireworks are to be delivered, possessed, stored, transhipped, distributed, sold, or otherwise dealt with in a manner or for a use prohibited by the laws of such State specifically prohibiting or regulating the use of fireworks, shall be fined not more than $1,000 or imprisoned not more than one year, or both. * * *"

2. Title 59, § 214, 1950 Code of Virginia, as amended:

> *"When sale, use, etc., of fireworks unlawful.*—Except as otherwise provided in this chapter, it shall be unlawful for any person, firm or corporation to sell, offer for sale, expose for sale, or to buy, use ignite or

explode any firecracker, torpedo, skyrocket, or other substance or thing, of whatever form or construction, containing nitrates, chlorates, oxalates, sulphides of lead, barium, antimony, nitro-glycerine, phosphorus or any other explosive or inflammable compound or substance, and intended, or commonly known, as fireworks. (1948, p. 591; Michie Suppl. 1948; § 4722 (4a).)"

STATEMENT

This petition challenges the decision of the Fourth Circuit Court of Appeals affirming an order of the District Court for the Eastern District of Virginia denying petitioner's motion to vacate a judgment of conviction (Appendix B, p. 12; R. Vol. 1, p. 32) for lack of jurisdiction and other reasons not pertinent here.

The petitioner was charged by an eighteen count information with violating 18 U.S.C.A. § 836 for having feloneously caused to be transported from Maryland into the Eastern District of Virginia, certain fireworks, knowing that they were to be delivered and sold in violation of the laws of Virginia. (R. Vol. 1, pp. 1-9)

The government's bill of particulars revealed that with respect to at least three counts, Nos. 10, 11 and 12, the feloneous deliveries were made to a customer in Stephens City, which is located in the Western District of Virginia. (Appendix B, pp. 12-13; R. Vol. 1, pp. 20-23)

On September 22, 1964, the petitioner entered a plea of guilty to Count 10 of the information (Appendix B, pp. 13-14). The remaining 17 counts were dismissed. (Appendix B, pp. 13-14, R. Vol. II, pp. 2-5).

On December 8, 1964, petitioner received a sentence of six months imprisonment, five months of which were suspended. (Appendix B, p. 14, R. Vol. IV, p. 71)

On December 14, 1964, petitioner filed a motion to vacate the sentence. (Appendix B, p. 12) The motion was denied. (Appendix B, p. 14; R. Vol. V, p. 39)

On Appeal the Fourth Circuit Court of Appeals affirmed the District Court. (Appendix A, pp. 8-10; R. Vol. VII, pp. 14-16)

REASONS FOR GRANTING THE WRIT

The denial of petitioner's motion to vacate the sentence passed by the court on a void information has deprived petitioner of his liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

The record shows (bill of particulars) that the offense charged and upon which sentence was passed was committed in a district other than the one in which the information was filed. Crimes against the United States must be tried in the district in which the offense was committed. *United States* v. *Jackalow*, 1861, 66 U.S. 484, 486; also, Sixth Amendment to the Constitution of the United States.

The provisions of 18 U.S.C.A. § 836 consider that the crime is committed where the fireworks were delivered for intended sale. The *locuus delicti* must be determined from the nature of the offense alleged and the location of the act constituting it. *United States* v. *Anderson*, 1946, 328 U.S. 699, 703; 66 S.Ct. 1213, 1216, 90 L.Ed. 1529.

The command of the Sixth Amendment [1] is geographic. The geography described is the district within which the offense is committed. It is important here to determine whether an offense under 18 U.S.C.A. § 836 is capable

---

[1] Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a * * * trial by an impartial jury of the State and district wherein the crime shall have been committed, * * *."

of commission only at the place of delivery or whether it may be committed in more than one place as suggested by the Court of Appeals opinion. The Circuit Court observed that "defendant did not move under Rule 21(b) to transfer his case to the Western District of Virginia." (Appendix A, p. 10)

This presupposes that an offense under 18 U.S.C.A. § 836 could be committed in two or more districts. Since this was not possible, petitioner was powerless to invoke the privilege for transfer accorded by Rule 21(b), F.R. Cr.P. This was the crux of the Circuit Court's erroneous opinion resulting in a denial of petitioner's liberty without due process of law.

The gist of the offense was that petitioner transported certain fireworks from Maryland, intended for and were delivered to the Western District of Virginia for a use prohibited by the laws of the State of Virginia. The descriptive words in 18 U.S.C.A. § 836 are: "delivered, possessed, stored, distributed and sold", all having reference to the prohibited use of fireworks contrary to State law. All of the activities of the petitioner connoted by those verbs took place only at Stephens City, Virginia, in the Western District of Virginia. Thus none of the principles of the multi-venue statute, 18 U.S.C.A. § 3237(a), were applicable where the place of the offense was so clearly set out in the statute itself as it is here. The distinction between a continuing offense and that contemplated by one such as 18 U.S.C.A. § 836 was clearly drawn by this Court in *United States* v. *Lombardo*, 1916, 241 U.S. 73, 77-78:

> "But the law, being usually practical, does not regard every crime as continuous for the purpose of jurisdiction. * * * for practical purposes it usually suffices to punish where the actor began, or where the subject suffered the intended result."

There is nothing in the legislative history of 18 U.S.C.A. § 836 to show an intention on the part of Congress to depart from the Sixth Amendment's command that trials shall be had in the "state and district wherein the crime shall have been committed." It would seem that the contrary was the purpose and effect of the provisions of 18 U.S.C.A. § 836.

This offense [18 USCA § 836] is not unlike many statutory offenses where the language itself specifies the place of prosecution. See, e.g. 18 U.S.C.A. § 659 [theft of goods in interstate commerce]; 18 U.S.C.A. § 1073 [flight to avoid prosecution]; 18 U.S.C.A. § 3232 [mailing threatening communications]. See, *United States* v. *Cores*, 1958, 356 U.S. 405, 407, 78 S.Ct. 875, 877, 2 L.Ed.2d 873.

The offense under 18 U.S.C.A. § 836 here was completed only after the delivery was made for purposes of a sale. This occurred in the Western District of Virginia, contrary to the allegations in the information, which recited the "Eastern District of Virginia." The information was void on its face. There was no way to cure it. It was in the Western District of Virginia that Congress says that the crime was "committed" in the sense in which that term is employed in the Sixth Amendment.

Venue should not be made to depend upon the government's lethargy, particularly since it knowingly allowed petitioner to plead guilty to a void information, based on a statute in which Congress had so carefully indicated the *locus* of the crime. If petitioner transported the fireworks from Maryland into the State of Virginia and en route had a change of heart, recalling the shipment to Maryland, certainly the circuitous route through the State of Virginia would not have constituted an offense under 18 U.S.C.A. § 836.

Thus, when a place was specifically designated where delivery was to be made, prosecution for making it lay

only at that place and no other. See *Travis* v. *United States*, 1960, 364 U.S. 631, 636, 81 S.Ct. 358, 361-362, 5 L.Ed.2d 340. Only the single act of delivering the fireworks for sale at a particular place was intended to be penalized under the statute here. It must be concluded that venue lay only in the Western District of Virginia. See, Sixth Amendment to the Constitution of the United States.

CONCLUSION

It is respectfully submitted that the foregoing petition for a writ of certiorari should be granted.

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9810.

UNITED STATES OF AMERICA,
Appellee,

versus

BERNARD J. SEMEL,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
OREN R. LEWIS, DISTRICT JUDGE.

(Argued May 7, 1965. Decided May 31, 1965.)

Before BOREMAN and J. SPENCER BELL, Circuit Judges, and BUTZNER, District Judge.

Joseph J. Lyman (Josiah Lyman on brief) for Appellant, and Plato Cacheris, First Assistant United States Attorney, (C. V. Spratley, Jr., United States Attorney, on brief) for Appellee.

PER CURIAM:

This is an appeal by the defendant, Bernard J. Semel, from an order of the district court denying his motions to vacate a judgment of conviction for lack of jurisdiction and to permit him to withdraw his guilty plea.

The defendant was charged by an information containing eighteen counts with violating 18 U.S.C.A. § 836 by having feloniously caused to be transported from Maryland into Virginia certain fireworks, knowing that they were to be delivered and sold in violation of the laws of Virginia.[1]

On September 22, 1964, the defendant entered a plea of guilty to count 10 of the information. After considerable questioning of the defendant, the court satisfied itself that the plea was voluntarily made and accepted it, and thereafter, on motion of the United States, the remaining seventeen counts were dismissed. Sentencing was postponed until a later date.

On December 8, 1964, Semel received a sentence of six months imprisonment, five months of which was suspended. On December 14, 1964, the defendant filed motions to withdraw his guilty plea and to vacate his sentence. Both motions were denied.

The record in this case reveals a guilty plea, voluntarily made with the assistance of retained counsel seven months after the defendant was arraigned. At a sentencing hearing three months after the plea was accepted, the defendant candidly admitted all the essential elements of the crime with which he had been charged. By the provisions of Rule 32(d) of the Federal Rules of Criminal Procedure, the withdrawal of a guilty plea after the im-

[1] Most of these counts dealt with fireworks transportation to persons located in the Eastern District of Virginia; counts 10-12 dealt with deliveries to one Gustave Michon of Stephens City, which is located in the Western District of Virginia.

position of sentence is permissible when, in the discretion of the trial judge, such a withdrawal is necessary "to correct manifest injustice." It is to be expected, however, that such a procedure will be appropriate only in extraordinary cases. *United States* v. *Roland*, 318 F.2d 406, 409 (4 Cir. 1963). In the circumstances of this case, the district judge clearly did not abuse his discretion in denying the defendant's motion to withdraw his plea. *Klingstein* v. *United States*, 217 F.2d 711, 712-13 (4 Cir. 1954).

The defendant's contention that the court was without jurisdiction is without merit, for 18 U.S.C.A. § 3231 gives the district courts of the United States jurisdiction over "all offenses against the laws of the United States." Under Rule 18 of the Federal Rules of Criminal Procedure, the proper venue for the offense charged in count 10 of the information may have been the Western District of Virginia. However, even after having been furnished with a bill of particulars which named Stephens City, Virginia, as the terminal point of the shipment charged to be illegal in count 10, the defendant did not move under Rule 21 (b) to transfer his case to the Western District of Virginia. Instead he entered a plea of guilty to the offense charged, and under Rule 12(b) (2), his actions constituted a waiver of any defect in venue which existed.

For the foregoing reasons, the judgment of the district court is affirmed.

Affirmed.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Criminal Information No. 4099

UNITED STATES OF AMERICA

v.

BERNARD J. SEMEL

THE UNITED STATES ATTORNEY CHARGES: * * *

COUNT TEN

THE UNITED STATES ATTORNEY FURTHER CHARGES:

That on or about the 24th day of July, 1962, BERNARD J. SEMEL, otherwise than in the course of continuous interstate transportation through the State of Virginia, unlawfully and knowingly did transport and did wilfully cause to be transported and did deliver for transportation 4 cartons containing 5,760 cherry bomb fireworks, that is, from Brandywine, Maryland, into the State of Virginia in the Eastern District of Virginia, and he then knew that said fireworks were to be delivered, possessed, stored, distributed and sold in a manner and for a use prohibited by the laws of the State of Virginia specifically prohibiting and regulating the use of fireworks, (Title 59, Section 214, 1950 Code of Virginia, as amended) (In violation of Title 18, United States Code, Section 836; Title 18, United States Code, Section 2)

* * * *

[Caption Omitted]

MOTION TO VACATE JUDGMENT AND TRANSFER CASE TO WESTERN DISTRICT OF VIRGINIA

Defendant moves the Court to vacate the judgment of conviction and transfer the case to the United States District Court for the Western District of Virginia.

For reasons defendant says that the transaction to which Count 10 has reference concerned a shipment of fireworks from the District of Maryland to Stephens City, which lies in Frederick County, Virginia. Frederick County lies outside the jurisdiction of this Court and no removal proceedings from the Western District of Virginia have been commenced.

This Court was without jurisdiction to pass judgment on the charges alleged in the information, particularly to Count 10.

WHEREFORE, defendant prays the judgment be vacated and the case transferred to the Western District of Virginia.

[Certificate of Service December 14, 1964]

[R. Vol. I, pp. 20-23]

[Caption Omitted]

BILL OF PARTICULARS

Comes now the United States of America by Plato Cacheris, First Assistant United States Attorney for the Eastern District of Virginia, and answers the defendant's Motion for Bill of Particulars as follows:

* * * *

10. In Count X of the indictment the person referred to is Gustave Michon, Stephens City, Virginia. The government intends to prove that the defendant Semel caused fireworks to be transported by William Wegand, 29 Williams Drive, Brandywine, Maryland.

11. In Count XI of the indictment the person referred to is Gustave Michon, Stephens City, Virginia. The government intends to prove that the defendant Semel caused fireworks to be transported by William Wegand, 29 Williams Drive, Brandywine, Maryland.

12. In Count XII of the indictment the person referred to is Gustave Michon, Stephens City, Virginia. The government intends to prove that the defendant Semel caused fireworks to be transported by William Wegand, 29 Williams Drive, Brandywine, Maryland.

PROCEEDINGS

September 22, 1964

* * * *

MR. HOWARD: We previously entered a plea of not guilty which the defendant would like to withdraw at this time as to Count 10 of the indictment and enter a plea of guilty to Count 10 of the indictment.

* * * *

MR. HOWARD: Yes, sir.

THE COURT: Mr. Semel, your counsel has just advised the Court that you wish to withdraw your previous plea of not guilty to Count 10 of the indictment pending against you and to tender a plea of guilty to that count; is that correct?

MR. SEMEL: Yes, sir.

* * * *

THE COURT: The Court is satisfied that the defendant thoroughly understands the nature of the charge and that the guilty plea is voluntarily made, and it is, therefore, accepted.

What is the government's position in reference to the other counts in the indictment?

MR. CACHERIS: The government moves to dismiss them, your Honor.

THE COURT: Upon the motion of the United States District Attorney the other 17 counts in the indictment, that is 1 through 9, inclusive, and 11 through 18, inclusive, are dismissed. You stand discharged and released insofar as those charges are concerned.

* * * *

Proceedings, December 8, 1964

[R. Vol. IV, p. 71]

* * * *

COURT * * *

In the case of Bernard Jacob Semel upon his plea of guilty and finding of guilty as to Count 10, it is the judgment of the Court that he be committed to the custody of the Attorney General for confinement for a period of six months, five months of which will be suspended.

* * * *

Proceedings, December 15, 1964.

[R. Vol. V, p. 39]

* * * *

THE COURT This is denial of all these motions you made.

* * * *

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 405

BERNARD J. SEMEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 8-10) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1965. The petition for a writ of certiorari was filed on July 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a sentence on a plea of guilty—the plea having been voluntarily entered, with the advice of counsel, after a bill of particulars had been furnished—should be vacated on the ground that the bill of particulars showed that venue was in a district other than that where the information was filed.

STATEMENT

In an eighteen count information filed in the Eastern District of Virginia, petitioner was charged with violations of 18 U.S.C. 836, by causing the transportation of fireworks, knowing that they were to be delivered and sold in violation of the laws of Virginia. The government's bill of particulars specified that the delivery referred to in counts 10-12 of the information was in Stephens City, Virginia (Pet. App. B. 12-13). After the particulars had been furnished, petitioner pleaded guilty in the Eastern District of Virginia to count 10 of the information and the remaining 17 counts were dismissed (Pet. App. B. 13-14). On December 8, 1964, petitioner was sentenced to imprisonment for six months, five months of the term being suspended (Pet. App. B. 14).

Petitioner then filed a motion to vacate sentence, alleging that the court was without jurisdiction to sentence him on count 10 since Stephens City is in the Western District of Virginia (Pet. App. B. 12). The district court denied the motion and the court of appeals affirmed, finding that petitioner's plea, volun-

tarily entered, "constituted a waiver of any defect in venue which existed." (Pet. App. A 10).

ARGUMENT

The ruling below was clearly correct. There is a difference between jurisdiction and venue. All district courts of the United States have jurisdiction over "offenses against the laws of the United States." 18 U.S.C. 3231. The right to trial in the district of the offense is the right of a defendant, which he may waive. See Rule 20, F. R. Crim. P. It has been held that where improper venue appears from the face of the indictment (which would include the indictment as supplemented by a bill of particulars), a defendant waives improper venue by proceeding to trial. *United States* v. *Jones*, 162 F.2d 72 (C.A. 2); *Rodd* v. *United States*, 165 F.2d 54 (C.A. 9); *Shetterly* v. *United States*, 205 F.2d 834 (C.A. 6). *A fortiori*, he waives the right to question venue by pleading guilty. *Walker* v. *United States*, 218 F.2d 80 (C.A. 7).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
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AUGUST 1965

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner presents his petition for rehearing of this Court's order dated 11th day of October, 1965, denying the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit and respectfully prays for a rehearing thereof.

GROUNDS FOR REHEARING

The petition for writ of certiorari was denied without opinion. Petitioner submits that the trial court below erred in denying defendant's motion to vacate the judgment of conviction on the grounds that the District Court for the Eastern District of Virginia was without jurisdiction to entertain petitioner's (defendant's) plea of guilty to Count 10 of the information; and consequently

the trial Court below was without jurisdiction to impose sentence thereon, since the conviction was void. The trial Court below was without jurisdiction to either convict petitioner, or to legally receive his plea of guilty.

Petitioner submits that since the District Court for the Eastern District of Virginia was without jurisdiction to either try petitioner on Count 10 of the information or to receive his plea of guilty thereon, and since the information from its inception was void, petitioner urges that the action of the District Court for the Eastern District of Virginia in imposing sentence upon him was and is a nullity.

That the failure of the trial court below to vacate the judgment of conviction and the imposition of sentence imposed thereon by the District Court for the Eastern District of Virginia has deprived petitioner of his liberty without due process of law and in violation of the Fifth Amendment to the Constitution of the United States; and that sustaining the validity of Count 10 of the information by the Courts below, petitioner's rights under the Sixth Amendment to the Constitution of the United States are violated, since crimes against the United States must be tried in the District in which the alleged offense was allegedly committed.

It is remarkable that in the brief of the Government in opposition to petitioner's petition for writ of certiorari (Opp. 2, 3) it is not contended that the offense ascribed to petitioner in Count 10 of the information was a continuing offense. Petitioner submits that Count 10 of the information referred to an origin and a destination. It is submitted that petitioner's conduct at place of origin was not a violation of Title 18 U.S.C.A. Sect. 836 and was not a violation of law; that the place of destination was Stephens City, Virginia, in the Western District of Virginia. Petitioner submits that transit of fireworks through the Eastern District of Virginia in and of itself,

was not an offense against the law; and thus, if an offense did exist as set forth in Count 10 of the information, venue for the same lay exclusively in the Western District of Virginia at all times and no where else. Thus, a disposition of the charge in Count 10 of the information against petitioner whether by a plea of guilty thereto or by a trial thereon, it is submitted that the same could only have taken place in the Western District of Virginia.

It is respectfully submitted that the failure of the trial Court below to permit petitioner to withdraw his plea of guily after sentence, where he protested his innocence throughout all of the proceedings was error. There was an abuse of discretion by the trial Court below in denying defendant's motion to withdraw his plea of guilty after sentence; and this abuse of discretion by the trial Court below was tantamount to a denial of due process of law under the Fifth and Sixth amendments to the Constitution of the United States. Petitioner urges that this is particularly and peculiarly so, in the case at bar, since there was ample and adequate reason and justification in the record of this case and in the law to grant his motion to withdraw his plea of guilty after sentence and to permit a reinstatement of his plea of not guilty to all of the counts contained in the information with the subsequent order of the trial Court below to direct the case to be tried on its merits.

A reasonably careful review of the record in this case, petitioner contends, clearly reveals that he was, indeed, deprived of his basic and fundamental rights under the Fifth and Sixth Amendments to the Constitution of the United States. The record in this case is replete with evidence supported by unequivocal testimony that petitioner tendered his plea of guilty on September 22, 1964, to the trial Court below through misunderstanding. Petitioner's entry of a plea of guilty through misunderstanding

and inadvertence was made unequivocally clear to the trial Court below by his protestations of innocence as to Count 10 of the information prior to the imposition of sentence on December 8, 1964.

The record is clear that petitioner moved promptly and without delay after sentence on December 8, 1964, to correct his misunderstanding and inadvertance of entering a plea of guilty to Count 10 of the information on September 22, 1964. A fair application of Rule 11 of the Federal Rules of Criminal Procedure by the trial Court below should have caused the Court to hesitate to accept petitioner's plea of guilty as to Count 10 of the information since the record facts show that defendant tendered a plea of guilty, actually through a misunderstanding of the nature of the crime charged in Count 10 of the information. Petitioner urges further that most surely the Court should have *sua sponte* pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure set aside petitioner's plea of guilty prior to sentence on December 8, 1964, after hearing petitioner's testimony before sentence was imposed; and most surely the Court should have vacated petitioner's plea of guilty, since prior to sentence, petitioner's then counsel stated that his client's acts were as consistent with innocence as with guilt. Petitioner urges further, the trial Court below should have vacated his plea of guilty to Count 10 of the information immediately after sentence was imposed since his then counsel apparently asked leave to move to vacate the judgment and sentence.

The record is replete with a showing that after petitioner's plea, but prior to sentence, he repeatedly asserted his innocence. The record is clear that the trial Court should have *sua sponte* invoked the letter and spirit of Rule 32(d) of the Federal Rules of Criminal Procedure at that time, permitting petitioner to withdraw his plea of guilty so as to correct a manifest injustice that at-

tended petitioner's situation, both prior to the imposition of sentence and subsequent thereto.

That at petitioner's hearing on December 15, 1964, on his motion to withdraw his plea of guilty to Count 10 of the information and to vacate the sentence and reinstate the plea of not guilty to the information and have a trial on the merits of the case, the trial Court below should not have hesitated in the slightest degree to have granted this motion in accordance with Rule 32(d) of the Federal Rules of Criminal Procedure.

POINT I

The petitioner raised the issue of jurisdiction of the District Court for the Eastern District of Virginia to accept his plea of guilty to count 10 of the information and thereafter impose sentence thereon upon him by his motion to vacate the judgment, filed December 14, 1964. (Appellant's App. iv, v, 26). The record shows, (bill of particulars) that the offense charged and upon which petitioner was sentenced, was committed in a District other than the one in which the information containing Count 10 thereof was filed. It has been held that crimes against the United States must be tried in the District in which the offense was committed. See *United States* v. *Jacklow*, 1861, 66 U.S. 484, 486; also, Sixth Amendment to the Constitution of the United States, so provides.

It is patently clear that the *locuus delicti* must be determined from the nature of the offense alleged and the location of the so-called criminal act constituting the offense. See *United States* v. *Anderson*, 1946, 328 U.S. 699, 703; 66 S. Ct. 1213, 1216, 90 L. Ed. 1529. The origin of the alleged acts of transportation initiated by petitioner in Brandywine, Maryland, was not in of itself an offense against the law; the destination referred to in Count 10 of the information refers to the Eastern Dis-

trict of Virginia. Petitioner submits that transit of fireworks through the Eastern District of Virginia in and of itself is not an offense against the statute. The destination of the delivery of the fireworks, so far as all of the alleged activities involving petitioner were concerned was to Stephens City, Virginia, in the Western District of Virginia. Consequently, venue to try petitioner for the offense alleged in Count 10 of the information, lay only in the Western District of Virginia. Since proceedings against petitioner could obtain exclusively and only in the Western District of Virginia, it was error for the District Court for the Eastern District of Virginia, either to accept petitioner's plea of guilty or impose sentence upon him thereon after his plea.

Thus in the case at bar, none of the principles of the multi-venue statute, 18 U.S.C.A. Section 3237(a), were applicable where the place of the offense was so clearly set out in the statute itself as it is here. The distinction between a continuing offense and that contemplated by one such as 18 U.S.C.A. Section 836 was clearly drawn by this Court in *United States* v. *Lombardo*, 1916, 241, U.S. 73, 77-78.

Venue should not be made to depend upon the government's inarticulation in drafting the information, since it knowingly allowed petitioner to plead guilty to a void information, based upon a statute in which Congress had so carefully declared the *locus* of the crime.

Therefore, when a place was specifically designated as to where delivery was to be made, prosecution for so making it could lay at that place alone, and no other. See *Travis* v. *United States*, 364 U.S. 631, 636, 81 S. Ct. 358, 361-362, 5 L. Ed. 2d 340. In the case at bar only one single act of delivery was involved for the alleged sale of fireworks; and this delivery alone, in the Western District of Virginia was intended to be penalized under

the statute here. Accordingly, venue lay only in the Western District of Virginia, and the information against and the prosecution of petitioner must originate there and be initiated there. See Sixth Amendment to the Constitution of the United States.

POINT II

Petitioner submits that the failure of the trial court to permit him to withdraw his plea of guilty to Count 10 of the information in the case at bar was an unwarranted abuse of discretion by court below; and this refusal by the trial court below to grant petitioner's efforts and motions to withdraw his said plea of guilty, and to reinstate his plea of not guilty to the information, and allow him to proceed to trial upon the merits of this cause, constituted a denial of Due Process of Law under the Fifth Amendment to the Constitution of the United States.

The record below unequivocally makes it clear that petitioner entered his plea of guilty to Count 10 of the information through a mistake and inadvertence. That the misunderstanding and misapprehension that obtained in the mind of petitioner at the time of entering his plea of guilty to Count 10 of the information on September 22, 1964, was such that Rule 11 of the Federal Rules of Criminal Procedure was hardly complied with in principle. The fact that petitioner was represented by counsel did not relieve the trial court below from requiring strict application and interpretation of Rule 11 at the time of entry of petitioner's plea of guilty. See, *United States* v. *Davis*, 212 F.2d 264, 267, (CA-7), 1954.

Petitioner submits that the trial court below, should have *sua sponte*, set aside his plea, pursuant to Rule 32 (d) of the Federal Rules of Criminal Procedure, on December 8, 1964, and prior to the imposition of sentence upon his previous plea of guilty to Count 10 of the infor-

mation; and most surely, petitioner, urges that even after the imposition of sentence on that day, the trial court below, could have and should have set aside his plea and the sentence imposed thereon when it appeared from both petitioner and his counsel that there was always a misunderstanding and mistake surrounding his original plea of guilty. See *Bergen* v. *United States*, 145 F.2d 181, 188 (CA-8 1944).

Rule 32(d) permits pleas to be withdrawn freely prior to sentence and to correct "manifest injustice" after imposition of sentence. Petitioner submits that the Court's failure on its own motion prior to sentence and then rejecting and denying petitioner's motions after sentence, even more particularly petitioner's motion of December 14, 1964, and after a hearing thereon, was a denial of due process under the Fifth Amendment to the Constitution of the United States. The law favors solicitude for fundamental and essential rights of the accused in considering the matter of guilty pleas; and the Court will grant relief thereon even after sentence has begun. See *United States* v. *Lias*, 173 F.2d 685, 688.

If the petitioner herein is innocent as asserted by him and the record below supports his claims and is not in conflict with his repeated insistence of innocence, due process requires that he be accorded a full trial on the charges against him. Only by granting him a trial can his rights under the Fifth and Sixth Amendments to the Constitution of the United States be secure and "manifest injustice," be corrected, herein.

CONCLUSION

It is respectfully urged that the petition for rehearing be granted and that, upon further consideration, A Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF COUNSEL

We, Joseph J. Lyman and Josiah Lyman, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified in Rule 58, Subdivisions 1 and 2 of the Rules of this Court.

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